No. 12,314

IN THE

United States Court of Appeals

For the Ninth Circuit

MIKE ERCEG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

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STATEMENT.

Appellant sets forth a fair statement of the pleadings which give rise to the questions presented in this appeal in the first two pages of his brief, with the exception that he might have set out the statutes of limitations applicable to this claim under the laws of the Territory of Alaska. These will be set forth where pertinent in this brief, *infra.*

QUESTIONS PRESENTED.

The appellee agrees that the sole question now before this Court is whether or not the District Court for the Territory of Alaska erred in sustaining appellee's demurrer herein on the ground that this action was not commenced within the time limited by law.

I. THIS ACTION WAS NOT COMMENCED WITHIN THE TIME LIMITED BY LAW.

It is manifest, from appellant's complaint and contract attached thereto (R. 2-17), that, as advanced in the second ground of appellee's demurrer (R. 20), the statute of limitations effectively barred this action.

The sections of the Alaska Compiled Laws Annotated, 1949, pertaining to the subject of limitation of actions and applicable to the case under consideration, are as follows:

> "Sec. 55-2-1. Civil actions shall only be commenced within the periods prescribed in this article after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited shall only be taken by answer, except as otherwise provided in Section 55-5-41.
>
> Sec. 55-2-3. Within ten years——
>
> * * * * * * *
>
> Second. An action upon a sealed instrument.
>
> Sec. 55-2-4. Within six years——

First. An Action upon a contract or liability, express or implied, excepting those mentioned in Section 55-2-3.

Sec. 55-5-41. The defendant may demur to the complaint within the time required by law to appear and answer, when it appears on the face thereof, either——

* * * * * * *

Seventh. That the action has not been commenced within the time limited by this code."

The contract, a copy of which is attached to and made a part of the appellant's complaint and on which appellant bases this suit, appears to be an ordinary express contract signed by both the parties but not under seal (R. 5-7) In paragraphs IV and V of his complaint (R. 3 and 4), the appellant alleges that the contract was entered into by the parties on the 17th day of July, 1942, and under the terms thereof the appellant rented to the War Department of the Government (the appellee) equipment for drilling water wells at Big Delta, Alaska, at an agreed daily rental charge. He further alleges that the Government used said equipment, under the terms of said contract, from the 17th day of July 1942, to the 1st day of December 1942, and now refuses to pay the amount of rent due for the use of said equipment during the time stated.

The contract provided that the rental term was to commence "from the 17th day of July 1942, until all wells at said Big Delta, Alaska, are completed." (R. 6.) In Paragraph V of the complaint, the appellant al-

II. APPELLANT IS ENTITLED TO NO REMEDY UNDER SECTION 13 (b) OF THE CONTRACT SETTLEMENT ACT OF 1944, SECTION 113 (b) OF TITLE 41, UNITED STATES CODE.

A close scrutiny of the Contract Settlement Act of 1944, 58 Stat. 649, Title 41, U.S.C. Sections 101-125, will show that all but three of its sections (excluding those relating only to the definitions, purposes, and administrative set-up under the Act) pertain solely to "termination claims". There is nothing in the record, and indeed appellant has no grounds whatsoever to so indicate, to show that this is a "termination claim".

The definitions in Section 3 of the Contract Settlement Act of 1944 show exactly to what type of claim the majority of the provisions of the Act apply. Section 3(h), 41 U.S.C. 103(h), reads as follows:

> "(h) The term 'termination claim' means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement."

Section 3(d), 41 U.S.C. 103(d) reads:

> "(d) The terms 'termination', 'terminate', and 'terminated' refer to the termination or cancelation, in whole or in part, of work under a prime contract for the convenience or at the option of the Government (except for default of the prime contractor) or of work under a subcontract for any reason except the default of the subcontractor."

No termination order as above defined ever issued here and there is no pretence in the record that one ever issued so that this might be called a "termination claim". Thus, appellant is entitled to none of the benefits of Sections 6, 7, 8, 9, 13, or 14 of the Act, 41 U.S.C. 106, 107, 108, 109, 113, 114, since he does not have a "termination claim". The Court below, therefore, would have had no jurisdiction under Section 13 of the Act, 41 U.S.C. 113, in any event and should also have sustained the first ground of appellee's demurrer which went to the jurisdiction of the subject matter. (R. 20.)

Of the three sections of the Contract Settlement Act of 1944 which have a broader scope, Sections 17, 18 and 19 (41 U.S.C. 117, 118 and 119), only Section 17 is pertinent to this action. As far as material here, that section reads as follows:

> "Sec. 17. (a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.
>
> (b) Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take

advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied in fact or in law, or in the nature of an implied or quasi contract.

(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 13 of this Act."

* * * * * * *

Just as it is obvious that appellant's claim is not a "termination claim", so it is evident that appellant cannot take advantage of Section 17, *supra,* 41 U.S.C. 117. Section 17(a) is applicable to a person "without a formal contract" only and, here, the very basis of this suit is the contract entered into by appellant and a Resident Engineer. (R. 7.) Section 17(b) is likewise inapplicable here since the United States is in no way attempting to take advantage of any defect or omission in appellant's contract. Thus, Section 17(c), which provides that disputes over the settlement of any claim under these first two subsections of Section 17 shall be subject to the provisions of Section 13 of the Act (giving such claimants the right either to appeal to the Appeal Board or to bring suit), affords appellant no relief. His claim is simply not covered by the Contract Settlement Act of 1944.

The above construction of Section 17 of the Act is supported by numerous decisions of the Appeal Board

created by Section 13(d), though apparently there has been no judicial construction as yet. The Appeal Board decisions, however, are a useful guide and should be given considerable weight since, as recently recognized by the Court of Claims, it has concurrent jurisdiction with the Court of Claims (and the district courts) over appeals from agency determinations on claims under the Act. *Piggly Wiggly Corporation v. United States,* 112 C. Cls. 391, 431 (1949).

In a case in which the Board denied a claim for the furnishing of materials on an oral order when they could have been furnished under a change order within the general scope of the changes article of the contract, the Board pointed out that (pp. 4, 6):

> "At the threshold of the case, we are confronted with the objection that appellants did not install the insulation 'without a formal contract', within the meaning of section 17(a). If the contention has merit, appellants cannot recover."
>
> * * * * * * *
>
> "The legislative history and language of section 17(a) evidence a broad purpose to assure fair compensation to any person who, in good faith reliance upon a Government request, arranges to furnish or furnishes war materials, services, or facilities, without a formal contract. This section does not apply to a person who renders performance pursuant to a formal contract, because, presumably, such person will receive compensation in accordance with the terms of the contract. * * *"

Brennan & Cahoon v. Navy Department, Vol. 1, Decisions of the Appeal Board, Office of Contract Settle-

ment (Govt. Printing Office 1948), decided May 8, 1946; C.C.H. Government Contracts Reporter, Par. 60,077.

In a case in which the Appeal Board denied a claim under Section 17 of the Act for work done for the Army Transportation Corps allegedly over and above a contract, the Board stated (page 4):

> "Considering, first, section 17(a), we are faced, as in so many cases, with the statutory denial of our power in cases where the services were rendered 'without a formal contract'. So long as the contract remains in this case, it constitutes an insurmountable obstacle to recovery under section 17(a). Is there any way in which this obstacle may be removed?"
>
> *Dinerstein, et al. v. War Department,* Vol. 2, *op.cit. supra,* decided June 2, 1947; C.C.H. Government Contracts Reporter, Par. 60,322.

In a case in which the Appeal Board denied a claim under Section 17 of the Act for work performed under a purchase order issued by the War Shipping Administration, claimant alleging ambiguity so as to invalidate the order as a contract, the Board concluded as follows (pages 112-113):

> "Since we have found that appellant furnished the materials in question under a formal contract, which was neither void nor voidable, it follows that appellant cannot successfully claim under section 17(a). That section affords relief in a proper case only to a person who proceeds without a formal contract (Cf. *Samuel Saffer's Sons v. War Department,* App. Bd. OCS No. 71

Vol. 1, decided January 31, 1947; *H. A. Johnson Company v. Navy Department,* App. Bd. OCS No. 66, Vol. 1, decided January 31, 1947.)

"What we have said largely disposes of appellant's claim under section 17(b). There is a valid formal contract, with no formal or technical defects or omissions. (*Cf. Samuel Saffer's Sons v. War Department,* App. Bd. OCS No. 71, Vol. 1, decided January 31, 1947; *H. A. Johnson Company v. Navy Department,* App. Bd. OCS No. 66, Vol. 1, decided January 31, 1947.) There is no room for the application of section 17(b).

"The findings of the Maritime Commission insofar as they deny appellant's claim are affirmed."

Rogers-Kellogg-Stillson, Inc. v. Maritime Commission, Vol. 3, *op. cit. supra,* decided October 28, 1948; see also, *Seymour Packing Company v. Department of the Army,* Vol. 3, *op. cit. supra,* p. 140, 142, decided November 26, 1948. C.C.H. Government Contracts Reporter, Paragraphs 60,578 and 60,600.

It is clear from the above that the only jurisdiction which the District Court for the Territory of Alaska could exercise in this case is its jurisdiction to hear appellant's contract claim against the United States as allowed and limited by the Tucker Act, 28 U.S.C. 41(20), now 1346(a)(2) and related provisions. As limited by Section 2401(a) of Title 28 United States Code, it is obvious from the complaint and attached contract that this action was not commenced within the time so limited by law.

It is equally clear that appellant cannot take advantage of the benefits and relief provisions of the Contract Settlement Act of 1944 since under that Act the jurisdiction of a District Court to hear a suit against the United States is limited to suits arising from "termination claims" or claims based upon the furnishing of materials, services or facilities by a person *without a formal contract* or one in which the contracting agency is attempting to take advantage of a technical defect or omission. Appellant comes within neither of these alternatives.

Appellant may well be a "war contractor" under the Act and may well have had a "prime contract" or "war contract" as defined therein, but the only applicability of the Act, if this is so, is to subject him to the provisions of the Act inserted for the protection of the Government and relating to the maintenance of records, investigations, liability for submitting fraudulent claims, etc. Since there is no termination claim involved in the case, nor any enforceable claim under Section 17 of the Act, appellant cannot take advantage of the Act to avoid the statutes of limitations barring this suit.

CONCLUSION.

For the foregoing reasons, therefore, it is respectfully submitted that the judgment of the District Court for the Territory of Alaska sustaining the second ground of appellee's demurrer in this case should be affirmed.

Dated, December 7, 1949.

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